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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268–0001

STATUTORY REVIEW OF THE SYSTEM FOR REGULATING RATES AND CLASSES FOR MARKET-DOMINANT PRODUCTS	Docket No. RM2017-3

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO MOTION FOR RECONSIDERATION OF ORDER NO. 3763
(February 10, 2017)

On January 30, 2017, the Commission issued an order concerning two motions by MPA—The Association of Magazine Media and the Alliance of Nonprofit Mailers (collectively, "Mailer Groups") for information requests about various matters of interest to the Mailer Groups.[1] Although the Commission advised that it "did not contemplate discovery within this proceeding" and formally denied the motions, the Commission remained open to requesting such information later, should it prove "necessary to facilitate [the Commission's] review."[2] On February 6, 2017, the Mailer Groups moved for reconsideration of Order No. 3763, arguing that it would be arbitrary and capricious for the Commission not to obtain the requested information before issuing its assessment of the current market-dominant regulatory system.[3]

The Mailer Groups' motion is baseless and should be denied. First, the Mailer Groups' motion overreads Order No. 3763 as absolutely denying the underlying motions

[1] Order No. 3763, Order on Motions for Issuance of Information Requests, PRC Docket No. RM2017-3 (Jan. 30, 2017).

[2] *Id.* at 3.

[3] Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Reconsideration of Order No. 3763, PRC Docket No. RM2017-3 (Feb. 6, 2017) [hereinafter "Motion for Reconsideration"]. A third mailing industry association filed a statement of support that adds nothing of substance to the Mailer Groups' motion. Statement of Support of the Association for Postal Commerce for the Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Reconsideration of Order No. 3763, PRC Docket No. RM2017-3 (Feb. 7, 2017).

or deferring them until after the Commission's determination of whether the current regulatory system is working. In fact, Order No. 3763 does not support such an extreme reading: a more reasonable interpretation (in light of longstanding Commission practice) is that the Commission will have ample time between the comment deadline and its planned decision date in which to conduct any fact-finding that it finds necessary, based on the comments. Second, despite the Mailer Groups' attempt to cast Order No. 3763 as a departure from longstanding Commission practice, that practice shows that information requests are discretionary, based on what the Commission believes is relevant to its decision; they are not an entitlement of parties seeking help in drafting their pleadings, and it is well within the bounds of agency discretion and Commission practice for the Commission to proceed in a fashion consistent with its Order. Finally, the Mailer Groups have added nothing material to show why their proposed information requests would be relevant or worth the burden that they would impose on the Postal Service. In this regard, it is baseless for the Mailer Groups to assert that the Commission must seek its requested information (either now or in the future) in order to make a valid assessment of whether the current system is meeting the statutory criteria.

I. THE MOTION MISINTERPRETS ORDER NO. 3763.

Much of the Mailer Groups' anxiety rests on their overreading of the Commission's order, particularly the words "later" and "stage." In the Mailer Groups' apparent view, the Commission has refused to issue information requests at all until after it concludes "phase 1" (i.e., determining whether the current regulatory system is meeting statutory criteria). Without such fact-finding, the Mailer Groups preemptively

declare that the Commission's phase 1 determination will be invalid.[4] In other words, the Mailer Groups argue, fact-finding on these issues cannot wait until after the phase 1 determination (expected to be by early autumn), and so it must happen immediately; there is no in-between.

In Order No. 3763, the Commission advised that its view on "discovery" at "this stage of the docket" "remains unchanged at this time," but allowed that it might "later determine[ ] that additional information is necessary to facilitate its review."[5] The open-endedness of this phrasing is clearly appropriate. Of course the Commission can issue an information request at any time it deems necessary. It may be that the Commission concludes that information requests are not needed to order to determine whether the current system is working, but could be useful in any second phase of the proceeding. Despite the Mailer Group's argument to the contrary, a decision that information requests are not needed to issue a valid phase 1 determination would be well within the Commission's authority to make. However, the phrase "later . . . to facilitate [the Commission's] review" also leaves open the possibility that the Commission could find information requests to be necessary any time throughout the time period between comments and the phase 1 decision. Nothing in Order No. 3763 rules this out or limits any possible fact-finding to, in the Mailer's phrasing, "the end of phase 1 (or, worse, the Commission's final decision in the case)."[6]

Order No. 3763 therefore does not support the Mailer Groups' assumption as to the order's intended effect. The Mailer Groups have a clear opportunity to make the

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[4] Motion for Reconsideration at 11-12.

[5] Order No. 3763 at 3 (emphasis added).

[6] Motion for Reconsideration at 12.

case in their comments for why these issues are relevant and deserve follow-up inquiry by the Commission in the months between the comment deadline and the Commission's phase 1 decision. As such, the Mailer Groups' motion for immediate issuance of an information request misses the mark.

II. THE COMMISSION'S APPROACH IS CONSISTENT WITH COMMISSION PRACTICE.

Beyond the issue of timing, the Mailer Groups are off-base in their attempt to concoct a "well-established practice" of information requests that the Commission is supposedly arbitrarily "abandoning."[7] The Mailer Groups preemptively attack any phase 1 decision that is not based on immediate issuance of their desired information requests as arbitrary and capricious – so much so, they intone, that a reviewing court might usurp the Commission's discretion over fact-finding and order party discovery itself.[8] However, black-letter case-law refutes such bold claims. Courts give agencies broad deference in determining how and when to build a factual record, and courts must refuse to create new procedural rights beyond those enshrined in the Administrative Procedure Act (APA).[9] Even the cases on which the Mailer Groups rely for the notion of

[7] *Id.* at 8-9.

[8] *Id.* at 10-11.

[9] *E.g.*, Perez v. Mortgage Bankers Ass'n, 574 U.S. __, 135 S. Ct. 1199, 1207 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.' To do otherwise would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.' . . . Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.") (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524, 544, 549 (1978)); Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333 (1976) (per curiam) ("An agency can exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence[.]"); Domtar Maine Corp. v. Fed. Energy Regulatory Comm'n, 347 F.3d 304, 314 (D.C. Cir. 2003) ("Moreover, we have long given agencies broad discretion as to the manner in which they carry out their duties, including the timing of their own proceedings.") (quoting *Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 606

"judicial correction" – in fact, the very sentences that they cite – use the concept only as a theoretical, extreme construct to illustrate the normal breadth of judicial deference as to procedural matters.[10]

Moreover, neither of those supposed "judicial correction" cases dealt with fact-finding procedures. In fact, other case-law indicates the extreme unlikelihood of court-ordered discovery. In *Transcontinental Gas Pipe Line Corp.*, the court of appeals determined that the agency had not properly developed the required factual predicate for an order and ordered the agency to investigate the matter and report its findings to the court. Even though the Supreme Court agreed that the record appeared to be incomplete, it unanimously held that the court of appeals had "overstepped the bounds of its reviewing authority" by ordering a specific course of agency fact-finding:

> [T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. Camp v. Pitts, 411 U.S. 138, 142 (1973). . . . At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a

F.2d 1031, 1056 (D.C.Cir.1979) ("[T]he agency . . . alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands. An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in any proceeding[.]")).

[10] Seacoast Anti-Pollution League v. Costle, 597 F.2d 306, 308 (1st Cir. 1979) ("Petitioners spend a good deal of space arguing that such an order is unprecedented in agency practice. If so, we might be curious why the Administrator issued such a novel order, but we would not, for that reason, have any basis to hold the order illegal. Absent law to the contrary, agencies enjoy wide latitude in fashioning their procedural rules." (citing *Vermont Yankee*, 435 U.S. at 543-44); *id.* at 308 n.1 ("In *Vermont Yankee* the Court speculated that '[i]t might . . . be true, although we do not think the issue is presented in this case and accordingly do not decide it, that a totally unjustified departure from well settled agency procedures of long standing might require judicial correction.' 435 U.S. at 542. Even were that true and were this 'a totally unjustified departure from well settled agency procedures of long standing', we would think that the rule would be limited to where the agency deprived some party other than itself of important procedural rights normally accorded.").

> procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).[11]

Thus, even if the Commission were, in the end, to fail to probe an essential matter – a conclusion that cannot possibly be drawn at this premature juncture – the consequence would be a remand to the Commission for additional explanation or fact-finding, not judicial creation of a right to party discovery.

Turning to Commission precedent, nothing in the Commission's rules or practice establishes a party's absolute entitlement to get its questions asked and answered, much less on its preferred schedule, in an informal rulemaking. To the contrary, Commission practice supports its wholesale discretion over whether and when to issue information requests (including those proposed by parties), based on the Commission's assessment as to what is necessary in order to efficiently and effectively conduct its proceeding.

The Mailer Groups are correct that the Commission has engaged in fact-finding in many informal proceedings.[12] However, it has also conducted numerous proceedings, including ones involving significant and novel issues, without any information requests. Notable examples include the proceeding to establish the initial regulatory system (Docket No. RM2007-1), the Commission's review of the rules for applying the price cap (Docket No. RM2013-2), its review of price elasticities and the effects of internet diversion (Docket No. RM2014-5), and the Commission's

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[11] *Transcon. Gas Pipe Line Corp.*, 423 U.S. at 332-33 (internal quotation marks and brackets in original). On remand, the court of appeals found the record, even as supplemented, still to be deficient and remanded the matter to the agency for further proceedings. *See generally* Transcon. Gas Pipe Line Corp. v. Fed. Power Comm'n, 562 F.2d 664 (D.C. Cir. 1976).

[12] Motion for Reconsideration at 9.

development of reports on the effectiveness of all aspects of the Postal Accountability and Enhancement Act (PAEA) (Docket No. PI2016-3) and on the definition and value of the universal service obligation and postal monopolies (Docket No. PI2008-3).[13] Many of these proceedings were dependent on quantitative analysis and factual determinations, yet there was no suggestion (as the Mailer Groups suggest here) that the Commission was *per se* incapable of rendering a non-arbitrary decision on the basis of public comments, publicly available materials, and its own analysis.

Of particular relevance here is the Commission's past practice in the context of ANPRs. As the Postal Service pointed out previously in opposing a separate motion by the same Mailer Groups, administrative law and practice, including the Commission's own, shows that ANPRs "seek to flush out the public's views on a regulatory matter."[14] As such, it stands to reason that the agency would not conduct fact-finding before receiving those public views and seeing what lines of inquiry are suggested. Commission practice reflects this: in no past proceeding has the Commission issued information requests during the ANPR stage.[15] While it is not inconceivable that the Commission could do so in this proceeding, <u>that</u> would be a unique departure from past practice, rather than a culmination of it. If nothing else, it is entirely consistent with the general nature of an ANPR stage for the Commission to defer any fact-finding until after the filing of comments.[16]

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[13] Additional examples include Docket Nos. PI2016-2, RM2011-3, RM2009-3, RM2008-5, and PI2008-1.

[14] Opposition of the United States Postal Service to Motions to Modify the Procedural Schedule, PRC Docket No. RM2017-3 (Jan. 24, 2017), at 2.

[15] See Docket Nos. RM2012-4, RM2007-1, and RM2005-1.

[16] As of this writing, Docket No. RM2017-1 is also in the midst of an ANPR stage. While no conclusions can be drawn yet about whether the Commission will issue any information requests during the ANPR stage of that proceeding, it is notable that the Commission did not do so in advance of comments.

The Commission's discretion to conduct fact-finding is even more pronounced when it comes to party-proposed information requests: some such motions are granted and some are denied. For example, in Docket No. PI2015-1, which concerned the use of internal systems for measuring service performance, there were eight motions for information requests. The Commission incorporated only three sets of proposed questions and part of a fourth into Chairman's Information Requests 2, 4, and 5. The Commission chose not to propound the remaining four (plus) sets of party-proposed questions on the Postal Service, presumably because the Commission did not find the questions relevant, helpful, or necessary.

If anything, the Commission's typical practice (with rare exceptions) is not to make any formal ruling whatsoever when granting or denying motions for issuance of an information request. Docket No. PI2015-1 illustrates this as well; another example is the lack of any Commission response to the Public Representative's motion for an information request in Docket No. MC2011-25.[17] That the Commission chose to furnish the Mailer Groups with a formal response here (in the form of Order No. 3763) is remarkable, but not in the way that the Mailer Groups believe. Far from the Mailer Groups' reading of it as an extraordinary brush-off, Order No. 3763 seems more like an extraordinary accommodation, aimed at allaying confusion about how parties should be devoting their resources during the comment stage of phase 1, and at reassuring parties that there will be time for any fact-finding that the Commission determines to be necessary after comments are filed.

[17] That proceeding concerned the transfer of various Post Office Boxes to the competitive products list.

III. THE MAILER GROUPS ADD NO SUBSTANTIAL JUSTIFICATION FOR IMMEDIATE ISSUANCE OF THE PROPOSED INFORMATION REQUESTS, WHICH HAVE LITTLE, IF ANY, RELEVANCE IN ANY EVENT.

In their all-or-nothing pursuit of an information request now, before the March 20 comments deadline, the Mailer Groups seem to confuse their parochial wish to include certain information in their comments with the Commission's determination of the information that is necessary and economical for it to collect in order to make a valid phase 1 determination. Apart from whether the information truly is vital to a Commission determination, the Mailer Groups have not persuasively shown that the Commission must have it now, as opposed to after it receives comments. Indeed, the Commission's interest in efficient and economical proceedings clearly militates in favor of waiting, lest the Commission burden itself and the Postal Service with inquiries that prove to be irrelevant after the Commission receives and assesses the comments.

In any event, the Mailer Groups have now had – and missed – multiple opportunities to demonstrate why the requested information requests must be issued either prior to comments being filed, or prior to the Commission issuing its phase 1 decision.[18] As discussed above, it is premature to prejudge the Commission's future fact-finding or the necessity of the sought-for information to its eventual determination. The Mailer Groups have also not pleaded that they will be deprived of an effective

[18] Whatever additional light the Mailer Groups' attempted January 27, 2017, reply to the Postal Service's earlier opposition might shed on their intentions (beyond the paltry explanations in the original motions and the instant motion for reconsideration), the Commission denied the Mailer Groups' motion for leave to reply. Order No. 3763 at 2 fn.4. As a result, the reply is not part of the record. The Mailer Groups' claim to "specifically incorporate [it] by reference" "[t]o preserve the record for potential judicial review" is baffling, and it seems to be nothing more than an attempt to circumvent the Commission's refusal to accept the reply into the record. *See* Motion for Reconsideration at 6 fn.3. That said, it bears noting that, even if the would-be reply were validly part of the record, the Mailer Groups still would have failed to meet the burdens identified in this section.

opportunity to comment without the information. Nor can they.

The Mailer Groups assert that the Commission cannot issue a non-arbitrary decision (at least not one unfavorable to the Mailer Groups) "without the factual information covered in the mailers' proposed information requests."[19] Even if that bold claim were true on its face (which it is not), the Mailer Groups have failed to overcome a key point in Order No. 3763: much of the information need not be requested because substantial information is already available that bears on the issues of interest to the Mailer Groups. Thus, the issue is not even arguably whether the entirety of the requested information is so vital as to risk invalidating any Commission decision without it, but whether that would be true of the subset of requested information that would actually need to be requested from the Postal Service. Contrary to the Mailer Groups' contention, it is not the Commission's (or the Postal Service's) burden to "dispute that most if not all of the information cannot be obtained except by propounding information requests or another form of discovery to the Postal Service."[20] Rather, as the Commission has made clear in the past, the burden is on the Mailer Groups, as the proponent of these motions, to show that the information requests are necessary in the face of other information sources.[21]

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[19] Motion for Reconsideration at 6.

[20] *Id.* at 7-8.

[21] Order No. 382, Order Denying Public Representative Motion to Compel the Postal Service to Provide Certain Estimates of Rate Adjustments, PRC Docket No. ACR2009 (Jan. 7, 2010), at 3-4 (deeming it "not warranted" to "[r]equir[e] the Postal Service to go through the complex and time consuming process of developing" information and analysis desired by another party, when publicly available information "provide[s] interested persons with a meaningful starting point for data, information, and analysis to argue to the Commission whether Postal Service rates and fees are (or are not) in compliance with applicable requirements" and "much of the information [that a party] would use to offer suggested remedies for any perceived noncompliance" (emphasis added)).

As the Postal Service and the Commission have noted, much of the information sought by the Mailer Groups is publicly available from authoritative sources.[22] It is telling that, in response, the Mailer Groups still have not indicated any effort to explore the wealth of responsive public data and to identify what, if any, deficiencies remain in their ability to meaningfully comment.[23] While it is not the Postal Service's job to do the Mailer Groups' homework for them, a brief summation of the publicly available Postal Service- and Office of Personnel Management (OPM)-derived information germane to the Mailer Groups' interest should suffice to illustrate the extent to which the Mailer Groups fall short of overcoming this precedent:

- the Postal Service's 10-K filings, annual reports to Congress, and other periodic reports, which contain information about postretirement benefits liabilities and property disposal activities;
- past Postal Service estimates (such as in its comments in Docket No. PI2016-3 and in Congressional testimony by the Postmaster General) about the impact of changing postretirement benefits liability assumptions and the timeline for exhaustion of postretirement benefits funds absent Postal Service payments;
- the owned and leased facilities reports on the Postal Service's Electronic FOIA Reading Room;
- at least two Congressional Budget Office (CBO) estimates of the ten-year impact

[22] Order No. 3763 at 3; Response of the United States Postal Service in Opposition to MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers' Motion for Issuance of Information Requests, PRC Docket No. RM2017-3 (Jan. 24, 2017), at 2-3 [hereinafter "USPS Opposition"].

[23] Instead, the Mailer Groups prefer to parse the semantics of the Postal Service and Commission's representations. Motion for Reconsideration at 8.

of proposed legislation to change postretirement benefits liability assumptions;[24] and

- Congressional testimony and reports by the Government Accountability Office (GAO) with ten-year projections of various liabilities and obligation funding levels.[25]

Among other things, these sources provide ample basis for "the parties [to] intelligently comment on, and the Commission [to] meaningfully assess," how the Postal Service's post-retirement benefits liabilities implicate the phase 1 determination.[26]

Beyond what is available from public sources, the Mailer Groups have not shown why "[a]nswering those questions requires" the Commission to request information of the Postal Service.[27] If the Mailer Groups desire additional information from OPM or another Federal entity, there is a well-established channel for them to obtain it directly from that entity.[28] The APA surely does not hold the Commission responsible if the

[24] If legislative or regulatory reform in the calculation of postretirement benefits liabilities were to occur during the course of this proceeding, then it will necessarily affect projections of financial stability. Unless and until that happens, however, any such reform is only speculative and cannot form the basis of a Commission determination. USPS Opposition at 3; *see* Order No. 864, Order Resolving Issues on Remand, PRC Docket No. R2010-4R (Sept. 20, 2011), at 42 (articulating the Commission's "role" as being not "to provide incentives to Congress [to change the law], but rather to apply the law in a manner that is consistent with congressional intent"). To the extent that the Mailer Groups nonetheless wish to argue on the basis of speculative reforms, it should be noted that OPM's proposed rule would not actually require the use of postal-specific economic assumptions, as recent and pending House legislation would, but rather would leave it to the OPM Board of Actuaries' discretion. USPS Opposition at 3 fn.5. *Compare* 81 Fed. Reg. 93,851, 93,853-54 (2016) *with* H.R. 756, 115th Cong. § 103(a)(2), (b)(1)(B) (2017); H.R. 5714, 114th Cong. § 103(a)(2), (b)(1)(B) (2016).

[25] The latest exemplar is Congressional testimony from earlier this week, although similar GAO testimony and reports have also been available since before the Mailer Groups filed their original motions.

[26] Motion for Reconsideration at 6.

[27] *Id.* In particular, the Mailer Groups fail to even acknowledge that the Postal Service pointed out the availability of CBO estimates in its earlier opposition. USPS Opposition at 3 fn.5.

[28] 5 U.S.C. § 552.

Mailer Groups fail to employ the very information channels provided in that Act. Similarly, if the Commission believes that information from OPM or another Federal entity would be helpful, then the Commission can send an interagency request on its own; there is no need for the Commission to make the Postal Service do so.

Although there is adequate basis to uphold Order No. 3763 without any further consideration of the underlying motions' merit, it is notable that the motion for reconsideration offers nothing substantially new to overcome the Postal Service's previous objections of relevance and burden.[29] It remains true that the Commission can reasonably deem it economical to explore the value of such matters as the specific calculation of any wage premium and the market value of the Postal Service's real estate only if they seem necessary to the Commission's phase 1 deliberation following the receipt of comments. And they may very well not be necessary.

For example, there is a reasonable basis for the Commission to determine that assessing the wage premium is not relevant to reviewing whether the system is achieving the objectives (properly interpreted) and would violate Congress's expressed intent to bar the Commission from using its discretion in ways that might influence the outcome of collective bargaining.[30] If the Commission ultimately reaches that legal conclusion, then the size of the wage premium has no bearing on this proceeding, and it

[29] The Mailer Groups seem to read significance into the Commission's "not disput[ing]" relevance in Order No. 3763. Motion for Reconsideration at 7. However, all that shows is that the Commission apparently did not deem it necessary to rule on relevance in order to dispose of the motions.

[30] USPS Opposition at 4-5. Whatever the arguable need to reconcile potentially conflicting statutory provisions that Congress decided to include in the PAEA (e.g., the initially mandated price cap and noninterference with collective bargaining), the Commission clearly lacks the authority to exercise its regulatory discretion (e.g., under 39 U.S.C. § 3622(d)(3)) in a way that PAEA § 505(b) prohibits. As noted in the Postal Service's earlier opposition, it bears emphasizing that Congress declined to implement a recommendation to give the Commission authority over pay comparability.

would be a waste of resources for the Commission to inquire into it.

In addition, the Commission can also reasonably conclude that determining precisely "when (if at all) the Postal Service's expected future liabilities to its retirees will exhaust the Postal Service's available assets" and "when and in what amounts those liabilities will come due"[31] is also unnecessary to conduct its phase 1 determination. The Postal Service is required by statute to finance its post-retirement benefits liabilities through a series of normal cost and amortization payments, based on actuarial determinations by OPM. If the Commission reaches the legal conclusion that the achievement of the objectives means the Postal Service must have the ability to make those payments, determining precisely when the funds set aside to finance those benefits would be exhausted (if those payments are not made) would be irrelevant to making the phase 1 determination, and it would be a waste of resources to inquire into this issue now.

By a similar token, the Commission can reasonably wait and see whether, upon a fuller briefing, there is any potential merit to the Mailer Groups' interest in real estate values before requiring the Postal Service to search for information. There is no basis to burden the Postal Service with an information request unless it would add material value to the Commission's determination. And there is plenty of reason to doubt that it would.

For one thing, the Postal Service's reporting of property asset values at historical cost, rather than current market value, is not a matter of "prudence." The Postal Service would be hard-pressed to obtain an independent auditor's opinion on its financial

[31] Motion for Reconsideration at 6.

statements – as it is required to do – if they were not prepared in accordance with Generally Accepted Accounting Principles (GAAP).[32] The historical-cost basis for valuing the Postal Service's properties is consistent with GAAP, as determined by the Financial Accounting Standards Board, the standard-setting body for the accounting profession.[33] GAAP is no less binding on the Postal Service than it is on other firms that must produce audited financial reports and that likewise report the value of their properties at historical cost (including the Mailer Groups' own constituents).[34] As such, the use of historical-cost valuation is not a matter on which postal management's business judgment can be judged.

The Mailer Groups' theory that property values could be relevant to evaluating the prudence of management's decisions to retain or dispose of property also fails to justify their information request. The Postal Service has been active in selling excess

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[32] 39 U.S.C. § 3654(c) (requiring independent auditor opinion); CODE OF PROFESSIONAL CONDUCT, Rules 1.320.001, .010, .030 (American Inst. of Certified Public Accountants 2016) (requiring auditors, as a condition of their qualification, to certify GAAP conformity and only permit departures in "unusual circumstances" to avoid misleading statements). A departure from GAAP along the lines that the Mailer Groups propose seems unlikely to be deemed justifiable, given the "unusual degree of materiality" and "industry practices" of conforming to GAAP's historical-cost standard (that is, "conflicting" with a departure from GAAP). CODE OF PROFESSIONAL CONDUCT, Rule 1.320.030.03; *see* footnote 34 *infra*.

[33] RECOGNITION & MEASUREMENT IN FINANCIAL STATEMENTS OF BUSINESS ENTERPRISES, Statement of Financial Accounting Concepts No. 5, ¶¶ 67(a), 68 (Fin. Accounting Standards Bd. 2008); *see* USPS Opposition at 3.

[34] *E.g.*, Walt Disney Co., Form 10-K for FY2016 (Nov. 23, 2016), at 73, *available at* http://thewaltdisneycompany.com/investor-relations; FedEx Corp., Form 10-K for FY2016 (July 18, 2016), at 92, 139-40, http://s1.q4cdn.com/714383399/files/doc_financials/quarterly/2016/FedEx-Corp-FY16-10K.pdf; Pitney Bowes, Inc., Form 10-K for FY2015 (Feb. 22, 2016), at 46, *available at* http://www.investorrelations.pitneybowes.com; R.R. Donnelley & Sons Co., Form 10-K for FY2015 (Feb. 25, 2016), at F-9, *available at* http://otp.investis.com/clients/us/rr_donnelley/SEC/sec-filing.aspx; United Parcel Serv., Inc., Form 10-K for FY2015 (Feb. 24, 2016), at 65, *available at* http://www.investors.ups.com; Time Inc., Form 10-K for FY2015 (Feb. 19, 2016), at F-13, *available at* http://invest.timeinc.com/invest/financials/sec-filings/default.aspx. Walt Disney and Time are members of MPA—The Association of Magazine Media. R.R. Donnelley is an associate member of MPA—The Association of Magazine Media and a "gold" corporate sponsor of the Alliance of Nonprofit Mailers. Representatives from all of the cited companies, except Walt Disney, sit on the board of the Association for Postal Commerce (which, as noted in footnote 3 above, supports the motion for reconsideration).

real estate and entering lease agreements where feasible, but opportunities for further disposals are diminishing.[35] A fundamental expectation underlying this proceeding is that the Postal Service must maintain its universal service operations,[36] for which the Postal Service must retain control of its properties. No realistic standard of prudent management or efficiency would require postal management to engage in a fire sale of Postal Service property that it actually needs to fulfill the universal service mandate, particularly given the uncertainty of negotiating adequate substitute leases.[37] Insofar as best practices inform "prudence," retaining ownership of a substantial portion of network facilities is well within the mainstream among other large mailing-industry firms (including the Mailer Groups' own constituents).[38] Even if some portion of current

[35] *See* UNITED STATES POSTAL SERV., FY2016 ANNUAL REPORT TO CONGRESS 54 (2016).

[36] *See* 39 U.S.C. § 3622(b)(3), (b)(5), (c)(14).

[37] It is admittedly unclear what the Mailer Groups mean by "sale-leaseback transactions." Motion for Reconsideration at 6; *see also* Motion of MPA—The Association of Magazine Media and Alliance of Nonprofit Mailers for Issuance of Information Requests, PRC Docket No. RM2017-3 (Jan. 17, 2017), at 10. If they mean entering into a capital lease (that is, borrowing cash against the collateral of property assets), as Amtrak has done, the Amtrak example itself calls into question the prudence of relying on such a strategy to sustain a service network in financial distress. *See* U.S. DEP'T OF TRANSP. OFFICE OF THE INSPECTOR GEN., CC-2002-181, AMTRAK'S FINANCIAL CONDITION 2-4 (2002) (depicting Amtrak's sale-leaseback transactions as "creat[ing] the illusion of progress," as they collateralized all available assets in exchange for a corresponding increase in Amtrak's debt load, without actually reducing costs or raising capital); U.S. DEP'T OF TRANSP. OFFICE OF THE INSPECTOR GEN., CR-2002-075, 2001 ASSESSMENT OF AMTRAK'S FINANCIAL PERFORMANCE AND OPERATIONS ii-iii, ix (2002) (opining that "[w]hile Amtrak would technically meet the letter of the law [that mandates self-sufficiency]" through additional sale-leaseback transactions, "the victory would be hollow" as (1) a strategy dependent on finite assets is "unsustainable" and (2) "more importantly, the cannibalization of the railroad's assets would compromise the future" and the "physical and financial integrity" of the service network). If the Mailer Groups mean selling properties outright subject to an option to lease the physical space for operations, then the resulting burden on the property might substantially depress prospective sale values, and estimates of "market value" would have little bearing on the actual returns that postal management could reasonably expect.

[38] *E.g.*, R.R. Donnelley & Sons Co., Form 10-K for FY2015 at 14 ("Of the Company's U.S. and international facilities, approximately 31.5 million square feet of space was owned, while the remaining 21.5 million square feet of space was leased."); United Parcel Serv., Inc., Form 10-K for FY2015 at 18 (reporting that the company owns its headquarters, 30 of its 31 principal domestic package operating facilities, and a 1.9-million-square-foot operating facility near Chicago, in addition to owning or leasing over 1,000 smaller domestic package operating facilities).

holdings could theoretically be disposed of without jeopardizing service, the information that the Mailer Groups seek about past sales or past studies would not show "what the [current, unsold] real estate could be sold for today," let alone furnish "a realistic estimate of the funds that the Postal Service could raise by selling surplus real estate (or engaging in sale-leaseback transactions)."[39] The responsive information would not indicate which properties are "surplus" or, if so, whether their theoretical sale value (after transaction costs) would so outweigh the net cost of retention as to render retention imprudent.

The point here is not to litigate relevance conclusively at this juncture. Rather, it is enough to illustrate the potential for the Commission to conclude that property valuation, as a matter of principle, has no bearing on prudent management, efficiency, or revenue adequacy. Hence, it is reasonable for the Commission to prefer to evaluate that threshold matter before, not after, committing its own and the Postal Service's resources to fact-finding on that topic. In the meantime, the Mailer Groups are free to make the case in their comments for why these issues are relevant and deserving of post-comment fact-finding.

Finally, insofar as the Mailer Groups' and the Commission might wish to plumb "the performance of the Flats Sequencing System [(FSS)], and the prudence and efficiency of the Postal Service's decisions" concerning it,[40] they are free to draw on years of Postal Service filings and Commission assessments concerning FSS's

[39] *See* Motion for Reconsideration at 6.

[40] *Id.* at 7.

effectiveness.[41] After all, even assuming that a utility-regulation notion of "prudence" is relevant here, as the Mailer Groups apparently believe, that notion involves an objective evaluation of what hypothetical reasonable, good-faith managers would have done under the same circumstances and at the time of the relevant investment decisions, not a searching inquiry into management's subjective views on a (now-past) investment.[42]

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[41] *E.g.*, Response of United States Postal Service to CIR No. 1, PRC Docket No. ACR2015 (Nov. 28, 2016); Third Response of the United States Postal Service to Commission Requests for Additional Information in the FY 2015 Annual Compliance Determination, PRC Docket No. ACR2015 (July 26, 2016); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2015, PRC Docket No. ACR2015 (Mar. 28, 2016); Response of United States Postal Service to Questions 1-4 of Chairman's Information Request No. 16, PRC Docket No. ACR2015, questions 1-4 (Feb. 29, 2016); Response of United States Postal Service to Questions 1, 6, 8, 10 and 12 of Chairman's Information Request No. 12, PRC Docket No. ACR2015, questions 1, 6, 8, 10, 12 (Feb. 19, 2016); Response of United States Postal Service to Questions 2-5, 7, 9, 11 and 13-17 of Chairman's Information Request No. 12, PRC Docket No. ACR2015, questions 2-5, 7, 9, 11, 13-14 (Feb. 17, 2016); Response of United States Postal Service to Questions 1-6, 8-10 of Chairman's Information Request No. 11, PRC Docket No. ACR2015, questions 1-6, 8-10 (Feb. 16, 2016); Response of United States Postal Service to Questions 1-15, 17-29 of Chairman's Information Request No. 7, PRC Docket No. ACR2015, questions 7-15, 17-18 (Feb. 8, 2016); Response of United States Postal Service to Questions 5-7, 9-10, 12, and 17-28 of Chairman's Information Request No. 6, PRC Docket No. ACR2015, question 20 (Jan. 29, 2016); Response of United States Postal Service to Questions 1-23 of Chairman's Information Request No. 4, PRC Docket No. ACR2015, questions 1-3, 9-18 (Jan. 22, 2016); Response of United States Postal Service to Questions 15-26 of Chairman's Information Request No. 2, PRC Docket No. ACR2015, questions 15-17, 20- 26 (Jan. 19, 2016); United States Postal Service FY 2016 Annual Compliance Report, PRC Docket No. ACR2016 (Dec. 29, 2015); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2014, PRC Docket No. ACR2014 (Mar. 27, 2015); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2013, PRC Docket No. ACR2013 (Mar. 27, 2014); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2012, PRC Docket No. ACR2012 (May 7, 2013); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2011, PRC Docket No. ACR2011 (Mar. 28, 2012); U.S. POSTAL REGULATORY COMM'N AND U.S. POSTAL SERV., PERIODICALS MAIL STUDY (2011); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2010, PRC Docket No. ACR2010 (Mar. 29, 2011); Supplemental Response of the United States Postal Service to Question from the Bench at the Hearing for Mr. Neri, PRC Docket No. R2010-4 (Aug. 27, 2010); Responses of the United States Postal Service to Questions from the Bench at the Hearing for Mr. Neri, PRC Docket No. R2010-4 (Aug. 19, 2010); Official Transcript of Proceedings before the Postal Regulatory Commission, Vol. 3, at 303-57, PRC Docket No. R2010-4 (Aug. 12, 2010); Response of the United States Postal Service to Information Question Regarding Flats Strategy Programs Posed at the Technical Conference on July 27, 2010, PRC Docket No. R2010-4 (Aug. 3, 2010); United States Postal Service, Library Reference USPS-R2010-4/9 - Operations Plans for Flats (Public Version), PRC Docket No. R2010-4 (July 6, 2010); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2009, PRC Docket No. ACR2009 (Mar. 29, 2010); Postal Regulatory Comm'n, Annual Compliance Determination, Fiscal Year 2008, PRC Docket No. ACR2008 (Mar. 30, 2009). This list may be extensive, but it is not necessarily exhaustive.

[42] *E.g.*, Indiana Mun. Power Agency v. Fed. Energy Regulatory Comm'n, 56 F.3d 247, 253 (D.C. Cir. 1995); Violet v. Fed. Energy Regulatory Comm'n, 800 F.2d 280, 282-83 (1st Cir. 1986).

Despite multiple opportunities to do so, the Mailer Groups have not met their burden of showing why their proposed information requests are necessary, in light of the publicly available information and the questionable relevance of the proposed information requests themselves. Far less have they shown why such information requests are necessary now and cannot wait until after the Commission has had an opportunity to review the parties' comments and decide what matters, if any, warrant further fact-finding.

IV. CONCLUSION

Order No. 3763 strikes the right balance between orderly management of a complex proceeding and preserving opportunities for further fact-finding, if necessary to the Commission's deliberation in light of the public comments. Rather than reading Order No. 3763 as signaling openness to fact-finding later in phase 1, the Mailer Groups insist on an implausible reading in the interest of finding fault with it. Moreover, the Mailer Groups have not offered anything new to justify their contention that the desired information requests are necessary at all, nor, at the very least, that they cannot wait until the Commission decides what issues are relevant, based on the public comments. The motion should be denied.

Respectfully submitted,
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